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# In the Supreme Court of the United States

OCTOBER TERM, 1966

CASCADE NATURAL GAS CORPORATION,
*Appellant,*
vs.
UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
*Appellees.*
No. 79 4

PEOPLE OF THE STATE OF CALIFORNIA,
*Appellant,*
vs.
UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,
*Appellees.*
No. 82 5

On Appeal from the United States District Court
For the District of Utah, Central Division

## Further Statement Supplementing Motions of El Paso Natural Gas Company to Dismiss or Affirm

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Nos. 79 and 82

# In the Supreme Court of the United States

OCTOBER TERM, 1965

| | |
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| CASCADE NATURAL GAS CORPORATION, *Appellant*, vs. UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, *Appellees.* | No. 79 |
| PEOPLE OF THE STATE OF CALIFORNIA, *Appellant*, vs. UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, *Appellees.* | No. 82 |

On Appeal from the United States District Court
For the District of Utah, Central Division

## Further Statement Supplementing Motions of El Paso Natural Gas Company to Dismiss or Affirm

### PRELIMINARY STATEMENT

Last term Appellee El Paso Natural Gas Company ("El Paso") filed its motion to dismiss or affirm in these appeals

and shortly thereafter it filed a statement supplementing the motions.[1]

El Paso's supplemental statement advised the Court that the parties to the action had filed a stipulation in the court below for entry of an agreed divestiture decree. Copies of the stipulation and agreed decree were attached to the supplemental statement. The stipulation provided that the decree might be entered thirty days after the stipulation was filed, and in that period any person deeming himself adversely affected might be heard as *amicus curiae* by the District Court.

This further statement supplementing El Paso's motions to dismiss or affirm is filed so that the Court may know of certain proceedings and occurrences which have taken place in the District Court and elsewhere since the United States and El Paso filed their stipulation for entry of the agreed divestiture decree.

## FURTHER PROCEEDINGS IN THE DISTRICT COURT AND THE FEDERAL POWER COMMISSION

On June 24, 1965, after notice to all persons who had requested it, El Paso moved for entry of the agreed decree in conformity with the stipulation. In the hearing on the motion the District Court received argument and statements from all persons who asked to be heard. Counsel for the United States represented to the court that the decree complied in all respects with the mandate of this Court in this cause (*U. S. v. El Paso Natural Gas Company*, 376 U.S. 651).

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1. The Appeal of Cascade Natural Gas Corporation ("Cascade") from an order denying its application to intervene in the divestiture proceedings below was No. 1090 last term and is No. 79 this term. The appeal of Mr. William M. Bennett as "Special Counsel for the People of the State of California," from a like order was No. 1101 last term and is now No. 82.

The District Court entered the agreed decree at the close of the hearing.

Promptly thereafter, on July 23, 1965, El Paso and Northwest Pipeline Corporation ("Northwest"), the new company organized pursuant to the decree to receive and operate the properties to be divested, filed with the Federal Power Commission the applications ordered by the District Court to be filed (Decree, § IVB). The applications seek the approval of the Federal Power Commission under the Natural Gas Act for transfer of the properties to be divested by El Paso to Northwest and operation of the properties by Northwest thereafter in service of its markets.

On August 18, 1965, the Federal Power Commission gave formal notice of the filing of these applications. It ordered all persons desiring to file petitions to intervene to do so by September 10 and ordered El Paso and Northwest to file testimony and hearing exhibits supporting their applications on or before October 1. The Commission also ordered the applications consolidated for hearing and disposition.

At the same time it heard El Paso's motion for entry of the divestiture decree, the District Court also entertained a further motion by El Paso for an order pursuant to Section IV(A) of the decree approving a chief executive officer for Northwest and Northwest's other initial officers and directors.

The United States and El Paso had earlier approved as chief executive of Northwest a seasoned and qualified executive who was formerly President of Mississippi River Corporation and before that President of Cities Service Gas Company. He took the stand and was examined extensively by the District Court. The court below found him to be both qualified and independent of El Paso.

He also gave testimony upon the qualifications and independence of other individuals approved by El Paso and the United States to serve as the other initial officers and directors of Northwest. All persons at the hearing who wished to examine him were permitted by the court below to do so. At the conclusion of the hearing the District Court entered its order approving Northwest's initial officers and directors as prayed for in El Paso's motion.

## NEITHER APPELLANT TOOK ANY EXCEPTION TO THE DECREE IN THE COURT BELOW

Cascade and Mr. Bennett were both invited, as stated earlier, to advise the District Court of any exceptions they had to the decree and, pursuant to the stipulation of the parties, to contend before the court below that the decree should be changed. Neither appellant did so, and we submit that any complaint they may have merits no attention from this Court for that reason alone.

### Cascade Did Nothing at All to Inform the District Court of Its Views.

Cascade filed nothing in the court below respecting the agreed decree and, although notified, made no appearance at the hearing.

### Mr. Bennett's Second Unsuccessful Application for a Stay in This Court.

Mr. Bennett, who has purported to appear as "Special Counsel for the People of the State of California," not only failed to present anything to the District Court respecting the decree but chose to pursue, instead, a further dilatory tactic.

On June 5, 1965, Mr. Bennett lodged with the Clerk of this Court an application for a stay of all proceedings below. Less than 120 days before, Mr. Bennett had applied for a like stay, which was denied by Mr. Justice Douglas on March 2, 1965.

The second stay application stated that Mr. Bennett had *the same day* requested the District Court to stay proceedings. The application below was a telegram in this perfunctory form:

> "California requests a stay of the proceedings in United States of America vs. El Paso Natural Gas Company Civil No. 143-57. Proposed decree for divestiture is contrary to United States Supreme Court mandate both as to substance and as to time and will further confuse and scramble corporate assets. Request prompt ruling upon this request.
>
> William M. Bennett,
> Special Counsel for the People
> of the State of California"

On June 7, 1965, the District Court, acting promptly after receipt of Mr. Bennett's telegram, entered a written order calling upon Mr. Bennett to file within 10 days:

> ". . . a written statement of points and authorities supporting his telegraphic application for a stay of proceedings in this action. Such written statement of points and authorities shall specify the respects in which it is claimed the stipulated divestiture decree filed herein on May 24, 1965, fails to comply with the mandate of the Supreme Court of the United States in the cause."

Without any pretense of complying, Mr. Bennett then addressed this further telegram to the District Court under date of June 10, 1965:

"Hon. Willis W. Ritter
United States District Court
for the District of Utah,
Central Division,
Salt Lake City, Utah.

Re Civil No. 143-57, U. S. vs. El Paso Natural Gas Company. Am advised that I have ten days to file written points and authorities in support of my telegraphic application for a stay. Herewith are points and authorities: United States of America vs. El Paso Natural Gas Company, 376 U.S. 651, where Justice Douglas ordered divestiture 'without delay'. Prompt ruling is called for in view of the fact that decree becomes effective soon and so that I may pursue other remedies in the United States Supreme Court. California submits application for stay and waives all further right to submit additional authorities. Please advise by return wire collect when court ruling is made.

William M. Bennett,
Special Counsel for the People
of the State of California
Room 5052, State Building,
San Francisco, California"

Mr. Bennett's second stay application, like the first, was opposed by both El Paso and the United States. Mr. Justice Douglas denied it on June 15, 1965.

## MR. BENNETT'S SECOND APPEAL

In his pursuit of other "remedies" in this Court, which, if successful, would defeat the prompt divestiture ordered by the mandate, Mr. Bennett took a further step of which the Court should be informed. After entry of the divestiture decree Mr. Bennett filed in the court below, on or about July 14, 1965, a notice of appeal from the decree itself and

"the accompanying order signed and filed therein appointing certain executive personnel [of Northwest]".

The time for docketing Mr. Bennett's second purported appeal has not yet expired, and the appeal is still undocketed. We submit that this circumstance should not deter this Court from disposing of Mr. Bennett's second appeal at the same time the Court decides the motions directed to his appeal from the order denying his application to intervene. In *Allen Co. v. Cash Register Co.*, 322 U.S. 137, the Court held:

> "Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed. It was, *inter alia*, to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the anti-trust acts, that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and that the statute limited the right of appeal to final decrees.
>
> "The record shows that the District Court had entered a final decree on the merits of National's petition prior to allowing the present appeal; and, if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act, and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment since it is not shown that the District Court abused its discretion in denying intervention.
>
> "The appeal is
>
> *Dismissed.*"

El Paso submits that the same principles should be applied here to dispose of both of Mr. Bennett's appeals at the earliest possible date in order that the further proceedings necessary to accomplish divestiture without delay may be completed with dispatch.

Respectfully submitted,

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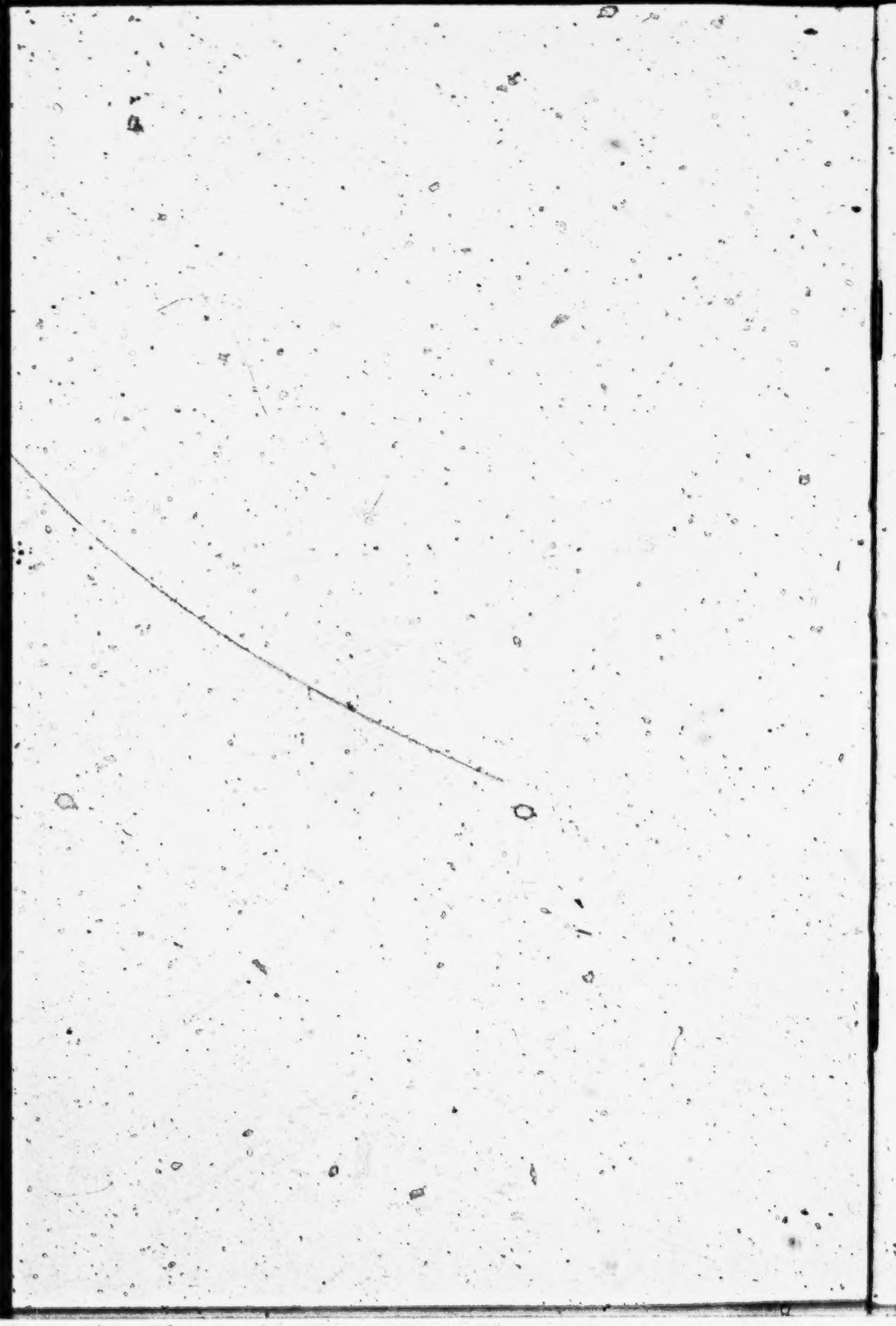

SUPREME COURT, U. S.

OCT 11 1965

JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ....825....

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Appellants,*

vs.

EL PASO NATURAL GAS COMPANY, et al.,
*Appellees.*

On Appeal from the United States District Court
for the District of Utah, Central Division

## Statement in Support of Jurisdictional Statement of the People of the State of California and Motion to Consolidate Appeals Pursuant to Rule 15(3).

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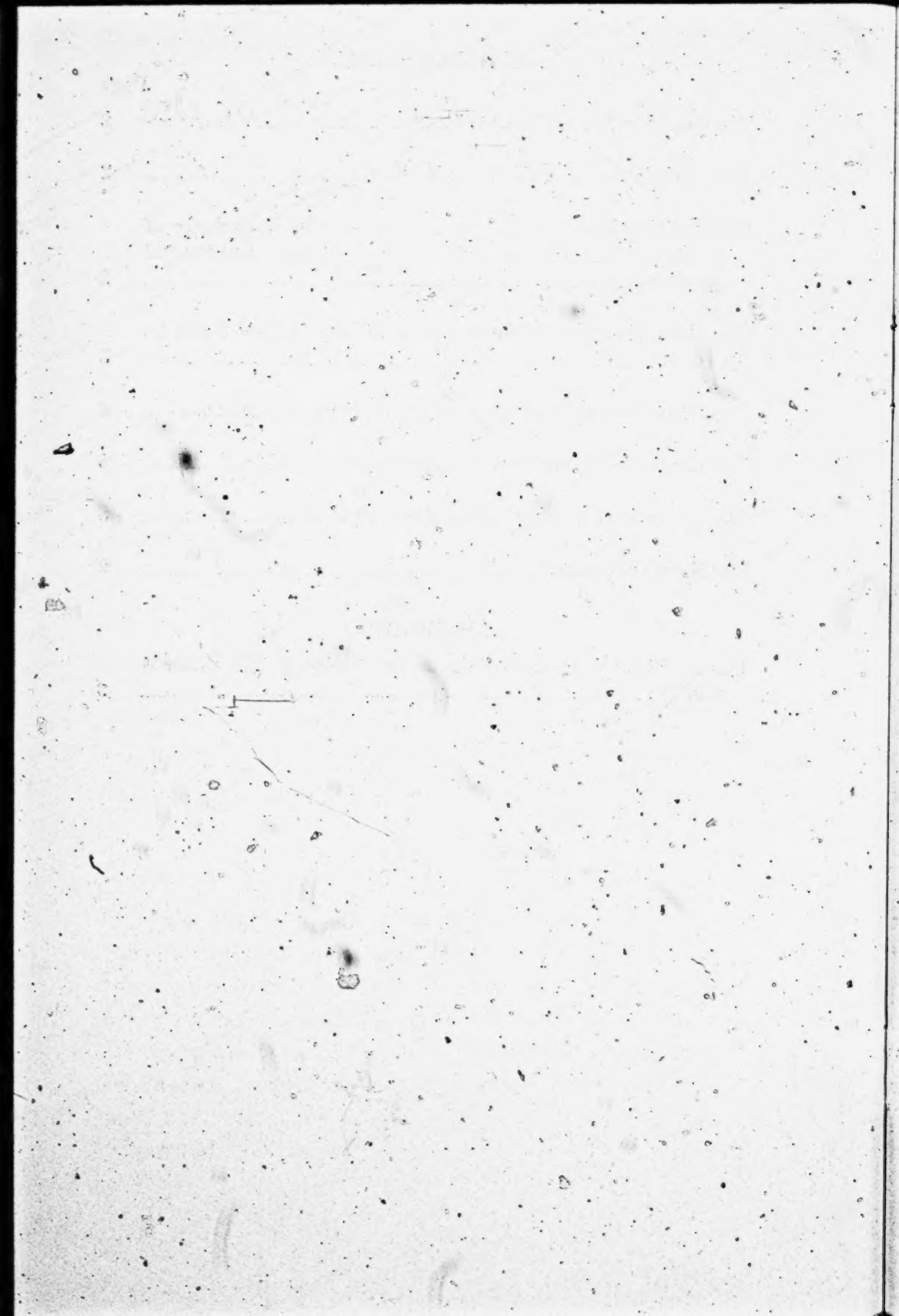

# In the Supreme Court of the United States

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No. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Appellants,*

vs.

EL PASO NATURAL GAS COMPANY, et al.,
*Appellees.*

On Appeal from the United States District Court
for the District of Utah, Central Division

## Statement in Support of Jurisdictional Statement of the People of the State of California and Motion to Consolidate Appeals Pursuant to Rule 15(3).

Several Notices of Appeal have been filed herein initially from the oral ruling of the trial court denying intervention; from the written order of the court denying intervention; and finally from the final Decree as herein entered. The People of the State of California (California) heretofore filed a Jurisdictional Statement in support of its appeal taken from the order entered below on January 22, 1965. Request is hereby made of the court that the various

appeals herein referred to be consolidated and that the Jurisdictional Statement heretofore filed be treated as the "single Jurisdictional Statement covering all cases" as is permitted by Rule 15(3) of the Revised Rules of the Supreme Court of the United States.

## THE QUESTION NOW BEFORE THE COURT

The Appellees herein have consistently sought to block review of this most important anti-trust question. A final decree has now been entered and its sufficiency as measured by the directive of this court to "reconstruct a viable pipeline" and "without delay" is very much a significant, live question of public importance.

## THE JURISDICTION OF THIS COURT IS PLAIN

As is set forth at length in the Jurisdictional Statement of California heretofore filed, the Supreme Court has an inherent and plenary power to scrutinize the actions of the trial court below and the final decree entered therein. Reference has heretofore been made to the case authority pointing out the plenary power of this court over its decrees. And it is that power which California seeks to invoke.

## THE DEFICIENCIES OF THE DECREE AND THE PUBLIC IMPORTANCE OF REACHING AN ADEQUATE DIVESTITURE RAISED SUBSTANTIAL QUESTIONS

The long, and indeed as the law goes, almost ancient beginnings of this litigation resulted in a directive to the lower court and to the original defendants herein to accomplish divestiture "without delay." This was a mandate binding upon the United States of America, The El Paso Natural Gas Company, the Pacific Northwest Pipeline Corporation, the trial court—all! The directive to divest "without delay"

is a simple unequivocal order. It is not to be subjected to the torturous contentions of parties defendant, the United States of America or others.

The record herein discloses a proposed decree once offered on behalf of the United States which would accomplish an outright sale to third independent parties. It is presumed that such a proposal was advanced by the government because there was some notion that the mandate of the Supreme Court had meaning and was to be observed. It is also presumed that the government tried the case pertaining to divestiture upon this theory and fashioned a proposed decree toward that end.

The sudden change of position by the United States and the arguments of the defendants which throughout most of the proceedings had been strongly opposed by the Government not only represented a complete change of position upon the part of the United States but brought into sharp focus the acceptability and correctness of the government's position as it was and as it came to be.

When was the position of the United States correct? When it embarked upon the divestiture proceedings and was adamant that El Paso's proposals were unsatisfactory? When it approved whether by way of sponsorship, recommendation, or whatever word suits the government, third parties who in the government's words were qualified both from the standpoint of financial ability and managerial skills to operate the Pacific Northwest Pipeline Corporation as a *new viable, independent natural gas company*?

## COMPLETE DIVESTITURE CAN BECOME A REALITY IF THIS COURT SO ORDERS

The government's brief below fashioned from its posture before the trial court and its evidence indicating outright

separation was required states the government's position well:

> "In the words of the government, it seeks to reconstruct Pacific Northwest '. . . as a viable pipeline able to serve its markets and able to expand to serve other markets. We seek to reestablish this company in such a way as to enable it to offer competition to El Paso for the California market and elsewhere . . . (Transcript 66). In order to accomplish this result we believe that the New Company should be created to stand free from any connection with El Paso . . .'
>
> "At Page 11 of the government's brief are discussed available alternative divestiture plans proposed by the government. And here the government points out that it has produced representatives of three separate groups, each of whom voices a willingness to purchase the new company and to operate it in competition with El Paso (Transcript 738-96). None of these prospective buyers is associated with El Paso (Transcript 751-52, 783-785-790). El Paso unfortunately has declined to negotiate with any of these prospective purchasers and yet as the government says 'There is no question but that these persons represent able and willing buyers each of whom is competent to operate the pipeline company divested (Transcript 776). El Paso has stipulated on the records that these persons are financially responsible and are able to manage the pipeline (Transcript 742, 749-750, 758, 777-78, 779-87, 790-91, 793-96, GX23).
>
> The government concludes then 'Thus, sale to a third party is both a desirable and feasible alternative to the El Paso plan'. (Pg. 12, Government Brief.)"

## THE FINAL DECREE DOES NOT COMPLY WITH THE MANDATE

The final decree on its face does not comply with the mandate. It gives the defendants an unusually long period

of time in which El Paso continues to control Pacific Northwest Pipeline Corp. It is the fact that the chief executive officer who is to embark upon the management of the new company has been selected by El Paso and placed in this position by El Paso with government consent. And though this is permitted the question nags at one: Is this the shortest way to corporate independence, human nature being as it is? Is not a loyalty, a gratitude, an obligation and an allegiance created at once? After all the new management owes its position to El Paso! And the hand of El Paso which fed the new management into the new company hardly expects so base a response as a competitive bite of the California market! Understandable yes! But effective monopoly control—no! The significant fact of continued control precludes any degree of independence upon the part of the newly selected management. One fact of corporate control which cannot be ignored is that the El Paso Natural Gas Co. continues to control the stock of New Company. California is not alone in its critical interpretation of the decree which is nothing but a defiance of the mandate of this court.[1]

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1. Remarks of Howard Boyd, Chairman of the Board, El Paso Natural Gas Company, before the New York Society of Security Analysts, August 25, 1965, gave this version of the divestiture decree as El Paso understands its terms:

"I am glad to be able to report that the program is proceeding satisfactorily, under a plan approved by the Federal District Court for Utah. This plan, incidentally, incorporates all of the provisions proposed by El Paso except for the method of disposition of the stock of the new company. . . .

"This rather unusal divestiture procedure raises in your minds immediately, I am sure, the question of the mechanics of the exchange offer. No final decision has been made as to such mechanics. It would, therefore, be premature to discuss various possibilities at this time. . . .

"Obviously, there is always the possibility that the exchange may not be accomplished, thus requiring a public sale. *This eventuality*

The remarks quoted in the footnote disclose that at least for purposes of public discussion El Paso agrees with the position of California that divestiture is not "without delay" and that the instant divestiture permits continued control and domination of the new company.

These public remarks set forth in the footnote herein are directed to the attention of this court to show that divestiture is being accomplished upon the highly self-serving terms obtained by El Paso after the government reversed its position in the trial court.

## THE CONTINUED IMPORTANCE OF COMPETITION

California needs natural gas! Presently before the Federal Power Commission is an application proceeding in which the Southern California Edison Company and the Department of Water and Power of the City of Los Angeles seek to import from out of state sources—the Southwest—additional quantities of gas committed to public utility needs.[2] The details of this controversy are fully set forth in the proceedings before this court to which Southern California Edison Company is a party. Let it be said, however,

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*cannot occur for many, many months.* Therefore, I shall not speculate as to how we might profitably employ this cash. Suffice to say that with our plans for expansion and diversification, we would expect no difficulty in maintaining a profitable return on the money. Moreover, the company could always buy in and retire some of its outstanding securities.

"As to the immediate future: *Our Northwest Division will continue as a part of El Paso Natural* until the FPC issues its certificates and the properties are transferred to the new company. We will *then retain ownership of Northwest Pipeline stock until* the divestiture is completed *within three years thereafter.*

"Although this is an extremely rapid divestiture, measured by experience of other companies, *it is still a substantial period down the road.*" (Emphasis added.)

2. Gulf-Pacific Pipeline Company, Docket CP63-223, et al, Federal Power Commission.

that this application proceeding represents an effort upon the part of Southern California Edison and the City of Los Angeles to free themselves of absolute dependency on the El Paso Natural Gas Co. for indispensable gas supplies. That application is being opposed by El Paso among others and the possibility exists that such project may be denied. If the project be denied then the realities of the natural gas business dictate that no other pipeline proposal from the Southwest to California, as Gulf Pacific, will be proposed for many years, if ever. It means that California and its gas distributing utilities will continue to have one overwhelming dominant out of state gas supplier—El Paso Natural Gas Co.

In view of the undisputed reality that the growing California gas market will require more out of state gas supplies, it becomes more critical than ever that the successor to the Pacific Northwest Pipeline Corp. be so constituted *and immediately* as to be in a position to be competitive to the El Paso Natural Gas Co. The requirements of additional natural gas, because of California's geographical position, are always met either from the Southwest gas producing areas or from the Canadian gas fields. And if the Gulf-Pacific project be denied then the logical area from which California should obtain additional gas lies to the north.

And as El Paso has fashioned and created its docile stepchild—New Company—so also is California absolutely prevented from successfully obtaining additional gas from Canadian sources. The New Company, because of the realities of economic life and corporate control will be unable to make any ventures toward California until El Paso is totally separated from its control of that company. The New Company so far as financial ability is concerned is

being brought into the world with a legacy of financial hardship and it will be even hard pressed to meet its obligations to its present immediate customers. More importantly than that perhaps is the fact that the control of New Company has been neatly vested in hands which at the least can be called not unfriendly to El Paso.

## THE IMPORTANCE OF PUBLIC DIVESTITURE PROCEEDINGS

The United States here went off at one point in the divestiture trial as though it were fashioning a consent decree. It ignored the fact that its task was simple—create in the trial court a separate independent competitive corporation doing so "without delay." Instead the government somehow backed into a position which has resulted in a new company which is in reality worse off than Pacific Northwest when it enjoyed a brief bit of independence. But the most frustrating fact about the ultimate result here as embodied in the Decree was the manner in which it was reached. The procedures of negotiation were used by the Anti-Trust Division of the Department of Justice and bargaining and give-and-take whatever it may have been occurred at meetings between the government representatives and the defendants. The parties were in and out of the trial court, chambers and what occurred there is not a matter of record. Does it not seem more appropriate in a matter of such consequence as this that all aspects of the divestiture proposal be the subject of hearings in open court tested by cross examination and submitted to the light of public scrutiny? For example the selection of the new management of New Company, how it was made, the understandings or lack thereof between new mangement and El Paso, all of these things are left to some speculation.

## THE RELIEF REQUESTED

California requests that the Supreme Court of the United States make this case its business once again. California asserts that the Decree is not in compliance with the spirit or the letter of the original mandate of the court herein and that unless this decree is set aside its pronouncement in *United States v. El Paso Natural Gas Company*, 376 U.S. 651 (1964) will be for naught.

California also asserts that this case calls for the court to set forth some implementing language concerning the nature of divestiture proceedings so that they do not degenerate into a scramble from which the original losing party emerges the winner—and most importantly the public the loser. The anti-trust laws and their enforcement are not satisfied by pronouncements without implementation. This decree as it stands is in violation of *United States v. El Paso Natural Gas Company*, supra.

Respectfully submitted,

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